Selvaraju a/l Velasamy & Anor v Abdullah Ali Kutty & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO (MT–1)12–101–1 OF 2005
VERNON ONG JC
26 SEPTEMBER 2008

Road Traffic — Negligence — Road accident — Duty of care — Road Transport Department — Whether Road Transport Department owed statutory or common law duty of care to ensure certificate of insurance lodged on an application for motor vehicle licence valid — Road Transport Act 1987 s 16(2)(a) — Motor Vehicles (Registration and Licensing) Rules 1959 r 15

Tort — Negligence — Road accident — Duty of care — Road Transport Department — Whether Road Transport Department owed statutory or common law duty of care to ensure certificate of insurance lodged on an application for motor vehicle licence valid — Road Transport Act 1987 s 16(2)(a) — Motor Vehicles (Registration and Licensing) Rules 1959 r 15

The plaintiffs were injured when they were collided into by a car ('the said car') driven by the first defendant and owned by the second defendant. The plaintiffs thus commenced a civil action in the sessions court against the defendants for damages in negligence. Before initiating their action, the plaintiffs had conducted a search at the JPJ to ascertain ownership and insurance particulars of the said car. The search revealed that the said car was insured by SEA Insurance under a policy of insurance. However, the plaintiffs were later informed by SEA Insurance that the said policy was forged and that the said car was not insured by SEA Insurance. The plaintiffs thereafter joined the JPJ and the Government of Malaysia respectively as the third and fourth defendant. The plaintiffs alleged that the third and fourth defendants had wrongly accepted a forged insurance policy and had wrongly issued a motor vehicle licence in respect of the said motorcar. The sessions court determined after the trial of the action that the first and second defendants were wholly liable for the accident and awarded damages against them, but the court dismissed the plaintiffs' claim against the third and fourth defendants. The plaintiff thus appealed to the High Court. The issue requiring determination was whether in granting a motor vehicle licence under s 16(2)(a) of the Road Transport Act 1987 ('RTA'), the third defendant owed a statutory or common law duty of care to road users to ensure that the certificate of insurance lodged on an application for a motor vehicle licence was valid and not a forgery.

Held, dismissing the appeal with costs:

(1) Section 16(2)(a) of the RTA and r 15 of the Motor Vehicles (Registration and Licensing) Rules 1959 clearly prescribe the conditions and the procedure to be complied with by an applicant when applying for a motor vehicle licence. These provisions cannot be said to impose a statutory duty on the third defendant to ascertain the authenticity of the certificate of insurance lodged with an application. There was therefore no statutory duty on the part of the third defendant when granting a motor vehicle licence to ensure that the certificate of insurance lodged by an applicant was valid and not a forgery (see para 33).

(2) Whether or not there is a common law duty of care depends on the three tests laid down in *Caparo Industries plc v Dickman* [1990] 1 All ER 568. A common law duty of care cannot be imposed on a statutory duty if the observance of such a common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance of such statutory duty (see para 35). *Caparo Industries plc v Dickman* [1990] 1 All ER 568 followed.

(3) In the instant case, the damage to the plaintiffs was not foreseeable and too remote since the accident occurred prior to the JPJ search and the information from that search could not possibly have caused or led to the plaintiffs' injury or damage. Further, all the characteristics giving rise to a special relationship required by the law of negligence did not exist in the instant case, with the result that there was no proximity in the relationship between the plaintiffs and the third defendant. Lastly, it was not just and reasonable to impose a duty of care upon the third defendant. It would be unreasonable and impractical to require every certificate of insurance to be authenticated for the purposes of granting a motor vehicle licence. It would not only require all counter clerks to be trained in the science of detection of forged certificates of insurance but also incur undue delay in the processing of applications (see paras 36, 44 & 48).

[Bahasa Malaysia summary

Plaintif-plaintif telah tercedera apabila mereka berlanggar dengan sebuah kereta ('kereta tersebut') yang dipandu oleh defendan pertama dan dimiliki oleh defendan kedua. Plaintif-plaintif seterusnya memulakan tindakan sivil di mahkamah sesyen terhadap defendan untuk mendapatkan ganti rugi dalam tindakan kecuaian. Sebelum memulakan tindakan mereka, plaintif-plaintif telah melakukan carian di JPJ untuk memastikan pemunyaan dan maklumat insurans kereta terbabit. Carian menunjukkan bahawa kereta tersebut diinsuranskan oleh SEA Insurance di bawah polisi insurans. Walau

bagaimanapun, plaintif-plaintif kemudiannya diberitahu oleh SEA Insurance bahawa polisi berkenaan adalah palsu dan kereta berkenaan tidak diinsuranskan oleh SEA Insurans. Plaintif-plaintif kemudiannya menggabungkan JPJ dan Kerajaan Malaysia sebagai defendan ketiga dan keempat. Plaintif-plaintif mendakwa bahawa defendan ketiga dan keempat menerima dengan salah insurans polisi yang palsu dan mengeluarkan dengan salah lesen kenderaan motor untuk kereta tersebut. Mahkamah sesyen menentukan selepas perbicaraan tindakan tersebut bahawa defendan pertama dan kedua bertanggungan sepenuhnya atas kemalangan itu dan dikenakan ganti rugi, tetapi mahkamah menolak tuntutan plaintif-plaintif terhadap defendan ketiga dan keempat. Plaintif-plaintif kemudiannya merayu ke Mahkamah Tinggi. Isu yang memerlukan penentuan ialah sama ada dalam membenarkan lesen kenderaan motor di bawah s 16(2)(a) Akta Pengangkutan Jalan 1987 ('APJ'), defendan ketiga mempunyai kewajipan statutori atau kewajipan berjaga-jaga *common law* kepada pengguna jalanraya untuk memastikan sijil insurans yang diserahkan untuk memohon lesen kenderaan motor adalah sah dan bukan palsu.

Diputuskan, menolak rayuan dengan kos:

(1) Seksyen 16(2)(a) APJ dan k 15 Kaedah-Kaedah Kenderaan Motor (Pendaftaran dan Perlesenan) 1959 dengan jelasnya menerangkan syarat-syarat dan prosedur yang perlu dipatuhi oleh pemohon apabila memohon lesen kenderaan motor. Peruntukan-peruntukan ini tidak mengenakan sebarang kewajipan statutori ke atas defendan ketiga untuk memastikan keaslian sijil insurans yang diserahkan dengan permohonan. Tiada kewajipan statutori bagi pihak defendan ketiga apabila memberi lesen kenderaan motor untuk memastikan sijil insurans yang diserahkan oleh pemohon adalah sah dan bukannya palsu (lihat perenggan 33).

(2) Sama ada terdapat kewajipan berjaga-jaga *common law* bergantung kepada ketiga-tiga ujian yang ditetapkan dalam *Caparo Industries plc v Dickman* [1990] 1 All ER 568. Kewajipan berjaga-jaga *common law* tidak boleh dikenakan terhadap kewajipan statutori sekiranya pematuhan terhadap kewajipan statutori adalah tidak konsisten, atau mempunyai kecenderungan untuk tidak menggalakkan pelaksanaan kewajipan statutori tersebut (lihat perenggan 35). *Caparo Industries plc v Dickman* [1990] 1 All ER 568 (diikut).

(3) Di dalam kes ini, kerosakan kepada plaintif-plaintif tidak boleh diramal dan terlalu jauh memandangkan kemalangan itu berlaku sebelum carian JPJ dan maklumat daripada carian tidak boleh menyebabkan atau membawa kecederaan atau kerosakan terhadap plaintif-plaintif. Seterusnya, segala contoh yang membawa kepada hubungan istimewa

yang dikehendaki oleh undang-undang kecuaian tidak wujud dalam kes ini, dengan keputusan menunjukkan tiada keakraban dalam hubungan plaintif-plaintif dan defendan ketiga. Akhir sekali, adalah tidak adil dan berpatutan untuk mengenakan kewajipan berjaga-jaga ke atas defendan ketiga. Adalah tidak berpatutan dan tidak praktikal untuk memastikan setiap sijil insurans disahkan bagi tujuan memberikan lesen kenderaan motor. Ia bukan sahaja memerlukan semua kerani kaunter dilatih dalam bidang pengesanan sijil insurans yang telah dipalsukan tetapi juga menyebabkan kelewatan dalam memproses permohonan-permohonan (lihat perenggan 36, 44 & 48).]

Notes

For cases on road accident negligence under road traffic, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 447–486.

For cases on road accident under tort, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1258–1500.

Cases referred to

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon [2003] 1 MLJ 567, CA (refd)

Caparo Industries plc v Dickman [1990] 1 All ER 568, HL (folld)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345, FC (refd)

Council of The Shine of Sutherland, The v Heyman & Anor (1985) 157 CLR 424, HC (refd)

Customs and Excise Commissioners v Barclays Bank plc [2006] 4 All ER 256, CA (refd)

Customs and Excise Commissioners v Barclays Bank plc [2007] 1 AC 181, HL (refd)

Donoghue v Stevenson [1932] AC 562, HL (refd)

Farrell v Alexander [1977] AC 59, HL (refd)

Gorringe v Calderdale Metropolitan Borough Council [2004] 2 All ER 326, HL (refd)

Groves v Wimborne (Lord) [1898] 2 QB 402, CA (refd)

Hague v Deputy Governor of Parkhurst Prison & Ors [1991] 3 All ER 733, HL (refd)

Home Office v Dorset Yacht Co Ltd [1970] 2 All ER 294, HL (distd)

Johannes Koplan v Aw Chen [1970] 1 MLJ 220, FC (refd)

Ketua Polis Ibu Pejabat Kontinjen Polis Seremban Negeri Sembilan & Anor v Manoharan a/l Dorasamy [2004] 3 MLJ 565; [2004] 1 CLJ 101, FC (refd)

Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors [1984] 1 MLJ 283, FC (refd)

Lembaga Tanah Persekutuan v Mariam & Ors [1984] 1 MLJ 283, FC

Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389, FC (refd)

A *Ministry of Housing and Local Government v Sharp & Anor* [1970] 1 All ER 1009, CA (refd)
Monk v Warbey & Ors [1935] 1 KB 75, CA (refd)
Pendaftar dan Pemeriksa Kereta-Kereta Motor Melaka & Ors v KS South Motors Sdn Bhd [2000] 2 MLJ 540, CA (folld)
B *Perrett v Collins & Ors* [1998] 2 LL R 255, CA (distd)
Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee & Ors [2003] 1 MLJ 273, CA (refd)
Stovin v Wise Norfolk County Council (Third Party) [1996] AC 923, HL (refd)
Tan Chik bin Ibrahim v Safety Life & General Insurance Sdn Bhd [1987] 1
C MLJ 217, FC (refd)
Tan Kwee Low v Lee Chong & Anor [1960] MLJ 212, HC (refd)
Van Colle & Anor v Chief Constable of Hertfordshire Police [2007] 3 All ER 122, CA (distd)
X & Ors (minors) v Bedfordshire County Council [1995] 2 AC 633, HL (refd)
D

Legislation referred to

Air Navigation Orders 1980 [UK] arts 7, 8(1)
Civil Law Act 1956 s 3, 3(1)
Criminal Procedure Code s 413
E Federal Constitution art 5
Human Rights Act 1998 [UK]
Motor Vehicles (Registration and Licensing) Rules 1959 rr 14, 15, 15(4), (5)
Police Act 1967 s 24(4)
Road Transport Act 1987 ss 8, 10, 11, 12, 15(1), (4), 16(1), (2), (2)(a), 17, 89, 90, 90(1), (2), 96(2), 98(1)
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T Balaskanda (Zaman & Associates) for the plaintiffs.
Amarjeet S (Senior Federal Counsel, Attorney General's Chambers) for the third and fourth defendants.

G **Vernon Ong JC:**

[1] This is an appeal against the decision of the learned sessions court judge ('SCJ') given on 29 April 2005 dismissing the appellants' claim against the
H respondents. In the court below the appellants are the first and second plaintiffs and the respondents the third and fourth defendants respectively.

BRIEF ACCOUNT OF THE FACTS

I **[2]** On 27 July 1998 a motorcar owned by the second defendant bearing registration No JDT 3969 collided into a motorcycle bearing registration No JEP 4333 ridden by the first plaintiff, the second plaintiff riding pillion. Motorcar JDT 3969 was driven by the first defendant. As a result of the accident the plaintiffs suffered injuries and sued the first and second

defendants for damages in negligence. Before initiating the action the plaintiffs conducted a search at the Jabatan Pengangkutan Jalan (third defendant) to ascertain the ownership and insurance particulars of motorcar JDT 3969. The plaintiffs then proceeded to sue the first and second defendants. Subsequently, after being informed by the insurance company that they are not the insurer of motorcar JDT 3969 the plaintiffs amended their statement of claim and joined the third and fourth defendants as parties to the proceedings. The plaintiffs alleged that the third and fourth defendants had wrongly accepted a forged insurance policy and wrongly issued a motor vehicle licence to motorcar JDT 3969 for the relevant period when the accident occurred. After the trial of the action the SCJ found the first and second defendants wholly liable and awarded general and special damages against the first and second defendants. The plaintiffs' claim against the third and fourth defendants was dismissed with costs.

FACTS IN ISSUE

(1) According to the JPJ search on motorcar JDT 3969 the motorcar was insured under a policy of insurance issued by South East Asia Insurance vide policy No 481520 for the period from 29 January 1998 to 28 January 1999.

(2) The third defendant issued a motor vehicle licence for motorcar JDT 3969 after accepting a forged certificate of insurance and payment of the appropriate fees.

(3) After receiving a notice from the plaintiffs pursuant to s 96(2) of the Road Transport Act 1987 ('RTA') informing that proceedings have been commenced against their insured, South East Asia Insurance informed the plaintiffs that they were not the insurers of motorcar JDT 3969. Instead South East Asia Insurance informed the plaintiffs that insurance policy No 481520 was issued for another motorcar bearing registration No JBY 6250.

(4) Whether the third defendant is liable to the plaintiffs in damages for accepting a forged insurance policy and issuing a motor vehicle licence for motorcar JDT 3969 for the relevant period when the accident occurred on 27 February 1998.

THE PLAINTIFFS' SUBMISSION

[3] In the first instance learned counsel for the plaintiffs submitted that the exercise of statutory duty or power by the third defendant has created a relationship between the plaintiffs and the third and fourth defendants. That relationship formed the basis of a common law duty of care. The plaintiffs relied on the JPJ search. As a result thereof the plaintiffs could not recover

A their financial loss because the motorcar was not insured. It was contended that the RTA, in particular s 8 and s 16(2)(a) imposed a duty of care on the third and fourth defendants. Sections 8 and 16(2)(a) provide that:

8 Keeping of register

B (1) A licensed registrar assigned to a registration area shall keep and maintain a register of all motor vehicles registered under this Act in the registration area to which he is assigned.

(2) Such register shall be in such form and contain such information, C details and particulars as the Director General may from time to time direct.

16 Requirements for application

(1) A motor vehicle licence shall be granted, for such period as may be D prescribed, on application being made to a licensed registrar.

(2) Every applicant for a motor vehicle licence shall furnish such particulars and produce such evidence as may be prescribed and in particular that either —

E (a) during the period of validity of the licence applied for there will be in force such policy of insurance or such security, relating to the motor vehicle for which such licence is required, as complies with the requirements of Part IV; or

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[4] Learned counsel argued that according to s 16(2)(a) a motor vehicle licence will only be granted if there exists a policy of insurance. As such it is the responsibility of the third defendant to make sure that there is a valid insurance coverage for the relevant period before issuing a motor vehicle G licence. Even though there is no contractual relationship between the plaintiffs and the third defendant the third defendant owed a duty of care to the plaintiffs (*Donoghue v Stevenson* [1932] AC 562; *Lembaga Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283) It was also argued that the payment of fees to get a motor vehicle licence and for the search is sufficient H for the plaintiffs to maintain an action against the third and fourth defendants. Relying on the English decision in *Ministry of Housing and Local Government v Sharp & Anor* [1970] 1 All ER 1009 learned counsel submitted that a duty of care exists where anybody conducts searches at the registry of a public authority on payment of a fee.

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[5] Secondly, learned counsel for the plaintiffs submitted that it is the duty of the third defendant to maintain correct particulars in its registry. The particulars and other information in its registry would be relied upon by aggrieved parties like the plaintiffs. By keeping information in its registry

which is based on forged documents the third defendant had failed in carrying out its duty under s 16(2)(a). It was contended that th e duty imposed upon the third defendant is this: to take care that all information is accurate in order to enable the paying class of persons to initiate and conduct a proper civil claim in relation to a particular motor vehicle. In support of this proposition learned counsel cited *Pendaftar dan Pemeriksa Kereta-Kereta Motor Melaka & Ors v KS South Motors Sdn Bhd* [2000] 2 MLJ 540. Learned counsel also referred to *The Council of The Shine of Sutherland v Heyman & Anor* (1985) 157 CLR 424 which held that reliance has always been an important element in establishing the existence of a duty of care. It has been suggested that liability in negligence is largely, if not, exclusively, based on the plaintiff's reliance on the defendant's taking care in circumstances where the defendant is aware or ought to be aware of that reliance.

[6] Thirdly, learned counsel for the plaintiffs argued that s 16(2)(a) imposes a duty on the third defendant to grant a motor vehicle licence only if there is a valid insurance coverage. A valid insurance policy for third party risks would protect road accident victims such as the plaintiffs. It was contended that this duty is for the benefit of a particular class of persons whom if injured would have a right of action at common law. The plaintiffs depended on the third defendant to proceed with their civil claim and that if the third defendant provided inaccurate information the plaintiffs' claim will fail (*Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee & Ors* [2003] 1 MLJ 273).

[7] Lastly, learned counsel for the plaintiffs argued that the plaintiffs' injuries and loss were the natural and probable consequences of the third and fourth defendants' wrongful act. The third and fourth defendants should have foreseen that its failure to make sure that each and every motor vehicle has a valid insurance policy would result in the plaintiffs not being able to get their compensation (*Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon* [2003] 1 MLJ 567).

THE THIRD AND FOURTH DEFENDANTS' SUBMISSION

[8] Learned senior federal counsel for the third and fourth defendants submitted that at common law the first defendant (owner of motorcar No JDT 3969) and the second defendant (driver of said motorcar) are liable to pay the plaintiffs any sum awarded by the SCJ as damages in the event that the second defendant is found negligent in causing the accident. Legislation submitted through the RTA introduced a scheme for compulsory insurance against third party risks whereby instead of the negligent driver and owner of the motor vehicle paying the damages, the insurers of the motor vehicle were made to pay for the liability insured against. This was adverted to by the Federal Court in *Tan Chik bin Ibrahim v Safety Life & General Insurance Sdn*

Bhd [1987] 1 MLJ 217 and *Johannes Koplan v Aw Chen* [1970] 1 MLJ 220) The insurer's liability to make payment is, however, subject to s 96(2) of the RTA which requires the party suing to give notice to insurer that proceedings have been commenced in court against their insured.

[9] In reply to the plaintiffs' submission on the duty of care learned senior federal counsel submitted that the plaintiffs are seeking to superimpose a common law duty of care on s 16(2)(a) which duty of care is non-existent at common law. The test in *Donoghue v Stevenson* does not apply to new situations as in this case. In fact the House of Lords in *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294 cautioned that while the *Donoghue v Stevenson* test 'marks a milestone in the modern development of the law of negligence. But misused as a universal it is manifestly false'.

[10] Learned senior federal counsel submitted that in new or novel situations such as this, the test to determine whether a duty of care exists is the *Caparo* test. This test applies to all negligence claims (*Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389). The Federal Court in *Steven Phoa* endorsed the view that caution should be exercised in extending the principle in *Donoghue v Stevenson* to new situations and added that much would depend on the facts and circumstances of each case in determining the existence or otherwise of a duty of care.

[11] Learned senior federal counsel submitted that there is no relationship of proximity between the appellants and the third defendant. Firstly, s 16(2)(a) merely provides for the requirements of an application that a person intending to use a motor vehicle needs to furnish to the third defendant. This statutory requirement is predicated upon s 15(1) which states that 'No person shall use or cause or permit to be used a motor vehicle in respect of which there is not in force a motor vehicle licence granted under this Act'. In addition, s 16(1) read with s 16(2) imposes a positive duty on a director of road transport department to grant a motor vehicle licence to an applicant who furnishes the particulars required and produces such evidence amongst others a policy of insurance. The duty imposed is clearly on the applicant and on the applicant alone. There is no duty imposed on the director to examine such evidence and make a determination that such policy of insurance is valid before the granting of a motor vehicle licence. Learned senior federal counsel added that the director's functions are purely regulatory, referring to the preamble to the RTA which states that the RTA is 'An Act to make provisions for the regulation of motor vehicles ... on roads ...'. He added that the RTA is a regulatory piece of legislation with social welfare in mind; the purpose of which is to encourage the public to purchase insurance policies for third party risks.

[12] Secondly, it was also submitted that the director of road transport department is a creature of the RTA and that the RTA is the only source of his functions. To impose a duty upon the director to examine the certificate of insurance in order to determine its validity amounts to a usurpation of the clear law and a blatant failure to heed the clear and unambiguous meaning and purpose of s 16(2)(a).

[13] Thirdly, the question of whether a duty of care exists in this case can only arise from the provisions of Part IV of the RTA itself. The whole foundation of the appellants' claim depends on the scheme providing for third party risks arising from the use of motor vehicles on roads. In this regard learned counsel referred to s 90 of the RTA which is as follows:

> 90 Motor vehicle users to be insured against third party risks
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> (1) Subject to this Part, it shall not be lawful for any person to use or cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part.
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> (2) If a person acts in contravention of this section he shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding three months or to both and a person convicted of an offence under this section shall, unless the court for special reasons to be specified in the order thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified from holding or obtaining a driving licence under Part II for a period of twelve months from the date of the conviction.

[14] Learned senior federal counsel argued that s 90 imposes a statutory duty on the person who uses or causes or permits other persons to use a motor vehicle on the road to ensure that there is in force a policy of insurance in respect of third party risks. Accordingly, this duty falls on the second defendant, the owner of motorcar JDT 3969.

[15] Fourthly, learned senior federal counsel argued that the relationship that existed in *Dorset Yacht Co Ltd* does not exist in this case. The third defendant had no control over the actions of the applicant for the motor vehicle licence. Instead, the third defendant is obliged to grant a motor vehicle licence to the applicant upon being furnished with the necessary particulars and evidence. This duty on the part of the third defendant is purely mechanical. This fact is disclosed by the evidence of the claim manager

of Uni Asia General Insurance (SP4) that the third defendant has never referred to the company for verification of a policy of insurance before granting a motor vehicle licence. SP4's evidence is also consistent with the evidence of the Director of the Road Transport Department, Johor Bahru (SD3) to the effect that that the department does not examine the policy of insurance submitted in an application for a motor vehicle licence in order to determine its validity. That is the responsibility of the person making the application.

[16] Learned senior federal counsel then submitted that even if a relationship of proximity is shown to exist, it is not fair and reasonable that the third defendant should owe the plaintiffs a duty of care. He cited two grounds. Firstly, in cases of victims of an accident who are denied compensation due to the absence of insurance or effective insurance, the victims may turn to the Motor Insurers' Bureau to secure compensation. This avenue is reflected in s 89 of the RTA which defined 'Motor Insurers' Bureau' to mean the Motor Insurers' Bureau which has executed an agreement with the Minister of Transport to secure compensation to third party victims of road accidents in cases where such victims are denied compensation by the absence of insurance or of effective insurance. The intention of the Legislature in making this provision effectively precludes any attempt to impose a common law duty of care on the third defendant. It has always been the position that once a statute governs or regulates a specific area then the common law is excluded (s 3(1) of the Civil Law Act 1956; *Steven Phoa*). Secondly, it was submitted that the responsibility to detect forgeries is a very onerous one and in which expertise is called for. Imposing such a responsibility would require a very high duty on the part of the third defendant to ensure that all policies of insurance submitted are not forgeries. In all the circumstances such a responsibility is unreasonable and impractical because hundreds of thousands of policies are lodged with the third defendant offices everyday. It would lead to a delay in the granting of motor vehicle licences and cause extreme hardship to the public as a whole.

[17] Learned senior federal counsel then addressed the issue of whether the damage suffered by the plaintiffs is reasonably foreseeable. In the present case the plaintiffs did not suffer the personal injuries or loss of opportunity to obtain the compensation by relying on the JPJ search. The injuries suffered by the plaintiffs were as a result of the road accident. The SCJ found the first and second defendants wholly liable for the accident. The accident occurred before the JPJ search was made by the appellants. Therefore the loss or damage suffered by the plaintiffs is not attributed to the JPJ search. In addition, the loss of opportunity to claim compensation from an insurance company was not caused by any negligent misstatement. The JPJ search merely stated who the insurer was for the purpose of service of notice under

s 96(2) of the RTA. That is the only purpose of conducting a JPJ search. The information in the JPJ search did not and could not have caused the injury or damage as there was never an insurance company at risk for motorcar JDT 3969.

[18] After considering the abovementioned submissions the parties were requested to submit on the following question with particular reference to ss 15(1) and (4), 16(2)(a) and 90(1) and (2) of the RTA and rr 14 and 15 of the Motor Vehicles (Registration and Licensing) Rules 1959 ('MVR'). They were also requested to refer to any recent decisions of other Commonwealth countries. The question is as follows.

> Whether in granting a motor vehicle licence under s 16(2)(a) of the RTA the third defendant owes a common law duty of care to road users to ensure that the certificate of insurance lodged on an application for a motor vehicle licence is valid and not a forgery?

THE PLAINTIFFS' SUBMISSION

[19] Learned counsel for the plaintiffs submitted that a common law duty of care exists even where there is no contractual relationship. In *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283, the Federal Court held that it is entirely up to our courts to develop our common law jurisprudence according to the needs of our local circumstances. It was also submitted that the concept of general reliance imposes a duty on the third defendant to take care that all information coming from its department are accurate (*KS South Motors Sdn Bhd*; *Heyman & Anor*). The same principle should be applied in this case. An applicant for a motor vehicle licence will produce a certificate of insurance to the third defendant. The particulars of the insurance including its policy number will be entered into the third defendant's system before a motor vehicle licence is granted to the applicant. Learned counsel contended that this is where the duty to make sure that the insurance policy is valid and not forged arises. If at the counter a forged insurance policy number is keyed into the system the third defendant has then breached its duty for having inaccurate information. This is because the appellant will rely on the information obtained from the third defendant to initiate a claim. It is thus contended that the third defendant owes a duty to all road users to ensure that the certificate of insurance lodged by an applicant is valid and not forged. It was further submitted that one of the main purpose of the RTA (as can be seen from the provisions of ss 90, 15(1) and (4), 16(2) of the RTA and rr 14 and 15 of the MVR) is to provide for the protection of third parties against risks arising out of the use of motor vehicles.

[20] Learned counsel also submitted that the appellants' claim is a private claim based on a common law duty of care. That duty of care arises either

from the imposition of a statutory duty or from the performance of it (*X & Ors (minors) v Bedfordshire County Council* [1995] 2 AC 633). On the issue of proximity *Home Office v Dorset Yacht Co Ltd* and *Perrett v Collins & Ors* [1998] 1 LL R 255 were cited in support of the proposition that proximity in the relationship between the claimant and the defendant can be established largely by reference to the nature of the relationship between the defendant and the third party. Further it was submitted that the *Caparo* tests used in determining whether a defendant sued as causing pure economic loss owed a duty of care disclosed no single common denominator by which liability could be determined. Instead the court would focus its attention on the detailed circumstances of the case and the particular relationship between the parties in the context of their legal and factual situation taken as a whole (*Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181). Learned counsel also alluded to the doctrine of general reliance. He contended that as the third defendant is the only body that controls the issuance of motor vehicle licences and usage of vehicles on our roads, the public expect them to carry out their duties in a manner that would not leave the public unprotected (*Stovin v Wise Norfolk County Council (Third Party)* [1996] AC 923). On the basis of the aforesaid premises learned counsel for the plaintiffs submitted that this court is given the power to develop the common law jurisprudence in accordance with s 3 of the Civil Law Act 1956 (*Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors*).

[21] Learned counsel for the plaintiffs also submitted that in granting a motor vehicle licence for motorcar JDT 3069 the third defendant allowed the motorcar to be used on the roads to the detriment of the plaintiffs. Therefore the third defendant had failed to protect the plaintiffs from being injured or knocked by the motorcar. By reason of the third defendant's aforesaid failure it was submitted that the plaintiffs have been deprived the right of their life. In support of this contention learned counsel referred to art 5 of the Federal Constitution and *Van Colle & Anor v Chief Constable of Hertfordshire Police* [2007] 3 All ER 122. Lastly learned counsel for the plaintiffs submitted that there is no doubt that the plaintiffs were the innocent victims of the third defendant's carelessness in failing to detect the forgery in the certificate of insurance (*Ketua Polis Ibu Pejabat Kontinjen Polis Seremban Negeri Sembilan & Anor v Manoharan a/l Dorasamy* [2004] 3 MLJ 565; [2004] 1 CLJ 101).

THE THIRD AND FOURTH DEFENDANTS' SUBMISSION

[22] In reply learned senior federal counsel submitted that in a claim in negligence with reference to a statutory duty the following matters must be established. Firstly, the provisions of the statute relied upon must impose an unqualified statutory obligation on certain specified persons to perform or

refrain from doing a particular act (*Groves v Wimborne (Lord)* [1898] 2 QB 402). Secondly, if the statutory duty exists, then the mere existence of that statutory duty cannot by itself generate a common law duty of care (*Customs and Excise Commissioners v Barclays Bank plc* [2006] 4 All ER 256). The fact that a particular provision was intended to protect certain individuals is also not of itself sufficient to confer private law rights of action; something more is required to show that the Legislature intended such conferment (*Hague v Deputy Governor of Parkhurst Prison & Ors* [1991] 3 All ER 733). Thirdly, in a case founded in negligence against the background of a statutory duty, the question is whether the statute excludes a private law remedy. To determine this question the policy of the statute and the statutory framework within which the act complained of was done is crucial (*Gorringe v Calderdale Metropolitan Borough Council* [2004] 2 All ER 326, *Hague v Deputy Governor of Parkhurst Prison & Ors*). Lastly, if a private law claim is not excluded, then the question of whether the third defendant's failure to make sure that the certificate of insurance is valid before granting a motor vehicle licence gives rise to common law duty of care falls to be decided by applying the principles laid down in *Caparo Industries plc v Dickman* [1990] 1 All ER 568.

[23] Learned senior federal counsel submitted that s 16(2)(a) of the RTA does not impose a statutory duty on the third defendant to ensure the authenticity or validity of a certificate of insurance lodged with an application for a motor vehicle licence. In order for a statutory duty to exist the provision must by clear words impose an unqualified statutory obligation on specified persons (*Groves v Wimborne*). In interpreting a statute, every statute is to be expounded according to its manifest or expressed intention (*Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345). Further, in the construction of all written instruments including statutes, what the court is concerned to ascertain is, not what the promulgators of the instrument meant to say, but the meaning of what they have said (*Farrell v Alexander* [1977] AC 59).

[24] Insofar as s 16(2)(a) of the RTA is concerned, the intention of the Legislature is clear. Applying either the literal or purposive approach in interpreting s 16(2)(a) of the RTA, it is clear that the section is merely informative. It sets out what an applicant for a motor vehicle licence must do. It prescribes the particulars and evidence that the applicant must produced including evidence of a policy of insurance in compliance with Part IV of the RTA. The words do not impose an unqualified statutory obligation on the third defendant. Therefore, the plaintiffs' reliance on s 16(2)(a) of the RTA as imposing a statutory duty on the third defendant is misconceived in law.

[25] Learned senior federal counsel, however, conceded that r 15(5) of the MVR read together with s 17 of the RTA imposes a statutory duty on the

third defendant to do certain specific acts before granting a motor vehicle licence. Rule 15(4) and (5) of the MVR and s 17 of the RTA are reproduced below:

Rule 15 Applications for licences

(4) Every applicant shall lodge with his application —

(a) a certificate of insurance or a certificate of security issued under the provisions of Part IV of the Ordinance establishing that during the period of the validity of the licence for which application is made, such certificate complies with the requirement of Part IV of the Ordinance in relation to the use of such vehicle as declared in the declaration for a licence, or evidence that the vehicle has been exempted from such requirement under the provisions of paragraph (5) of section 74 of the Ordinance;

(b) the registration certificate relating to such motor vehicle;

(c) .

(d) .

(e) the prescribed fee.

(5) Upon receipt by a Director of an application that complies with the conditions prescribed in this rule the Director *shall as otherwise provided* in the Ordinance or rules made thereunder —

(a) *grant to the applicant a licence* in such form as may be appropriate to the type or class of vehicle in respect of which the application is made;

(b) enter upon such licence before the issue thereof:

(i) the registration number of the vehicle;

(ii) the fees paid; and

(iii) the stamp or other sufficient mark indicating the Director by whom the licence was granted and the date when the fees were paid:

Provided that a Director shall not be required to grant any licence unless he is satisfied that the licence is the appropriate licence for the vehicle specified in the declaration.

Section 17 Licensed registrar may refuse to issue motor vehicle licences in certain cases

(1) A licensed registrar *shall not be required to grant* any motor vehicle licence for which an application is made *unless* —

(a) the registration certificate relating to the motor vehicle specified in such application is produced and the particulars contained in such application are identical with the corresponding particulars contained in such registration certificate;

(b) the identifying particulars of the motor vehicle, including the engine and chassis number, remain clear, distinct and untampered and are identical with the corresponding particulars contained in such registration certificate;

(c) the prescribed fee has been paid; and

(d) he is satisfied that the applicant has no outstanding matter or case with the Road Transport Department or the Police relating to any contravention of or offence against this Act or the Commercial Vehicles Licensing Board Act 1987.

(Emphasis added.)

[26] Rule 15(5) of the MVR states the functions of the third defendant when dealing with an application for a motor vehicle licence. Other than these express provisions, the third defendant's functions are purely administrative in that once an applicant complies with all the conditions set out in r 15(4) the third defendant is duty bound to grant the licence. It was submitted that r 15(5) read with s 17 of the RTA does not impose a statutory duty on the third defendant to ensure the authenticity of a certificate of registration lodged together with an application. To hold otherwise would be tantamount to reading into the provisions words not intended by the Legislature. If Parliament had intended the third defendant to make sure that a certificate of insurance is authentic before granting a motor vehicle licence, it would have expressly included this duty in s 17 of the RTA.

[27] Assuming that a statutory duty did exist learned counsel submitted the question is whether the statute excludes a private law action. The policy of the RTA is, inter alia, for regulating motor vehicles and traffic on the roads and providing for the protection of third parties against risks arising out of the use of motor vehicles. Learned counsel argued that a private law cause of action is excluded as the observance of such a common law duty would be inconsistent with, or have a tendency to discourage the due performance by the authority of its functions (*X & Ors (minors)*). Secondly, if such a common law duty is imposed the third defendant would be obliged to examine and determine the authenticity of all documents submitted and ascertain that all motor vehicle's chassis and engine numbers are not tampered. In fact forgery of documents and tampering of engine and chassis numbers can only be determined by experts. Such an obligation would impose an undue burden on the third defendant and would hamper or curtail the daily functions of the

department (*Ketua Polis Negeri Sembilan & Anor v Manoharan Dorasamy*). Thirdly, the RTA has already provided for the protection and benefit of third party risks in Part IV. This appellants falls within this class of the public. The RTA has specifically created a remedy against any person who uses or permits any other person to use a motor vehicle without a valid policy of insurance in force (*Monk v Warbey & Ors* [1935] 1 KB 75 and *Tan Kwee Low v Lee Chong & Anor* [1960] MLJ 212). Fourthly, the provisions of r 15(5) of the MVR must be given effect to. The director is obliged to grant a motor vehicle licence upon the production of a certificate of insurance and on being satisfied of the matters stated in s 17 of the RTA.

[28] Even assuming that there is foreseeability of harm and sufficient proximity, learned counsel submitted that it is not fair, just or reasonable to impose a duty of care on the third defendant. Firstly, Part IV of the RTA provides for third party victims to secure compensation from the Motor Insurers' Bureau where such victims are denied compensation by the absence of insurance. Secondly, the detection of forgeries is a very onerous responsibility and one which requires expertise. It is unreasonable and not practical to require examination to detect forgeries for hundreds of thousands policies are presented to the third defendant (*Ketua Polis Negeri Sembilan & Anor v Manoharan Dorasamy*).

FINDING OF THE COURT

[29] At the outset it is pertinent to examine the statutory framework regulating the granting of a motor vehicle licence. Firstly, no motor vehicle may be used or permitted to be used on any roads unless there is in force a motor vehicle licence (s 15(1) of the RTA) In ordinary parlance, a motor vehicle licence is also commonly referred to as a 'road tax'. A motor vehicle licence is granted for a period of six or twelve months (s 16(1) of the RTA, r 14 of the MVR) The applicant is required to lodge with his application, inter alia: (i) a certificate of insurance; (ii) the registration book relating to the motor vehicle; and (iii) the prescribed fee (s 16(2) of the RTA, r 15(4) of the MVR). The certificate of insurance submitted must relate to a policy of insurance in respect of third party risks (s 90(1) of the RTA) Upon receipt of an application that satisfies the prescribed conditions the third defendant shall grant to the applicant a motor vehicle licence.

[30] Insofar as the third defendant's statutory functions and duties are concerned, the provisions of the RTA are clear and unequivocal. Upon a duly furnished application being submitted together with all relevant evidence as required by the RTA and the MVR, the third defendant shall grant a motor

vehicle licence. The preliminary issue is whether the third defendant has a statutory duty under the RTA to determine the authenticity of a certificate of insurance. At this juncture it is relevant to note that the RTA sets out a number of instances when the third defendant may refuse to grant a motor vehicle licence (s 17 of the RTA) The instances include when: (i) the particulars contained in the application are not identical with the corresponding particulars contained in the registration certificate produced; (ii) the identifying particulars of the motor vehicle, including the engine and chassis number, are not clear, distinct and untampered and are not identical with the corresponding particulars contained in such registration certificate, (iii) the prescribed fee is not paid, and (iv) the third defendant is satisfied that the applicant has outstanding matter or case with the Road Transport Department or the police.

[31] In interpreting a statute effect must be given to the object and intent of Parliament in enacting the statute. In *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 Edgar Joseph Jr FCJ delivering the judgment of the Federal Court said at p 352:

> It is right to say at the risk of being trite, that in interpreting a statute, what the court is endeavouring to do is to give effect to the object and intent of Parliament in enacting that statute. In *Cheatley v R* (1972) 127 CLR 291, Barwick CJ said at p 296: 'In construing the section we are seeking Parliament's intention'. Similarly, in *A-G (Canada) v Hallet & Carey Ltd* [1952] AC 427, Lord Radcliffe said at p 449: '*... every statute is to be expounded according to its manifest or expressed intention*.'
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> To whom can the judges turn for help in the task of determining Parliament's intention? The orthodox view is not Parliament or the draftsman; they have to discover that intention from the words that Parliament has used in the particular statute. This proposition has been well brought out by Lord Simon of Glaisdale in *Farrell v Alexander* [1977] AC 59 at p 81; [1976] 2 All ER 721 at p 733; [1976] 3 WLR 145 at p 158:
>
> > *... in the construction of all written instruments including statutes, what the court is concerned to ascertain is, not what the promulgators of the instrument meant to say, but the meaning of what they have said*. It is in this sense that 'intention' is used as a term of art in the construction of documents.

In *Hatton v Beaumont* [1977] 2 NSWLR 211, the court had occasion to observe at p 225:

> The function of the court ... is to give effect to the intention of the Legislature. This it may do without difficulty where it appears from the terms of the legislation that the Legislature directed its attention to the question and expressed an intention upon the effect to be given to the particular provision. But in most cases ... such an intention is not expressed and the court's task is, by the application of the appropriate principles, to divine or impute that intention.

> It is a truism that Parliament does not always use plain words to express its intention and when this is the case so that the words used fail to convey the intention, courts may then have to resort to the devise of ascertaining that intention by necessary implication from the words which Parliament has used. Courts are, however, slow to find an intention by mere implication (see *Young v Farrah & Nicholas Enterprises Pty Ltd* [1976] 13 SASR 444 at p 454 per Hogarth J).
>
> (Emphasis added.)

[32] In order for a statutory duty to exist the statutory provisions must therefore be clear and unequivocal. In *Groves v Wimborne (Lord)* [1898] 2 QB 402 Vaughan Williams LJ had this to say at p 415: '... where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, prima facie, and if there be nothing to the contrary, an action by that person so injured will lie against the person who has so failed to perform the duty. I have equally no doubt that, where in a statute of this kind a remedy is provided in cases of no performance of the statutory duty, that is a matter to be taken into consideration for the purpose of determining whether an action will lie for injury caused by non-performance of that duty, or whether the Legislature intended that there should be no other remedy than the statutory remedy.'

[33] In this context s 16(2)(a) of the RTA and r 15 of the MVR clearly prescribes the conditions and the procedure to be complied with by an applicant when applying for a motor vehicle licence. In construing the meaning of the said provisions it cannot be said that the said provisions impose a statutory duty on the third defendant in the granting of motor vehicle licences to ascertain the authenticity of the certificate of insurance lodged with an application. To adopt such an interpretation would be tantamount to importing contrary meaning to the plain words of the said provisions. Accordingly, there is no statutory duty on the part of the third defendant when granting a motor vehicle licence to ensure that the certificate of insurance lodged by an applicant is valid and not a forgery.

[34] In the absence of a statutory duty on the part of the third defendant the principal issue in this appeal that falls to be determined is whether in granting a motor vehicle licence under s 16(2)(a) of the RTA the third defendant owes a common law duty of care to road users to ensure that the certificate of insurance lodged on an application is valid and not a forgery. In this respect the plaintiffs' claim against the third and fourth defendants is based on a private law cause of action. Private law claim for damages can be classified into four categories, viz: (a) actions for breach of statutory duty simpliciter (ie irrespective of carelessness); (b) actions based solely on the

careless performance of a statutory duty in the absence of any other common law right of action; (c) actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it; and (d) misfeasance in public office, ie the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct is unlawful (*X & Ors (minors)*). A B

[35] The plaintiffs' claim falls under category (c) viz a common law duty of care arising either from the imposition of the statutory duty or from the performance of it. In this context, the plaintiffs contend that the statutory duty in the granting of motor vehicle gives rise to a common law duty of care owed to the plaintiffs by the third defendant to ensure that the certificate of insurance lodged by an applicant is valid and not a forgery. The question whether or not there is a common law duty of care falls to be decided by applying the three tests laid down in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at pp 573–574. Firstly, was the damage to the plaintiffs reasonably foreseeable? Secondly, was the relationship between the plaintiffs and the third defendant sufficiently proximate? And thirdly, is it just and reasonable to impose a duty of care? (*Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors*). The question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done. A common law duty of care cannot be imposed on a statutory duty if the observance of such a common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the third defendant of its statutory duties. C D E F

[36] Firstly, was the damage to the plaintiffs foreseeable? The plaintiffs' claim is for the compensation that they were not able to recover from the first and second defendants because motorcar JDT 3969 was not insured on the date of the accident. The plaintiffs' argument is premised upon their reliance on the JPJ search which provided that South East Asia Insurance was the insurer of third party risks for motorcar JDT 3969 when in fact it was not. The plaintiffs' loss and damage were the result of a road accident in which the SCJ found the first and second defendants to be wholly liable. The accident occurred before the plaintiffs carried out the JPJ search. The information sought in the JPJ search is for the purpose of serving a notice under s 96(2) of the RTA. This information could not possibly have caused or led to the plaintiffs' injury or damage. There was no insurer at risk for motorcar JDT 3969 at the material time. In the particular circumstances of the present case it is plain that the damage to the plaintiffs was not foreseeable and too remote. Accordingly, the question is answered in the negative. G H I

[37] Secondly, was the relationship between the plaintiffs and the third

defendant sufficiently proximate? The plaintiffs' contention is that it is the third defendant's duty to maintain correct particulars in its registry. The particulars and information in its registry would be relied on by the paying class of persons to initiate and conduct a proper civil claim in relation to a claim in relation to a particular motor vehicle. In *Pendaftar dan Pemeriksa Kereta-Kereta Motor, Melaka v KS South Motors Sdn Bhd*, the respondent are in the business of buying and selling new and used motor vehicles. On 8 July 1980 the respondent were approached by two brokers who were anxious to sell a second hand Mercedes Benz 240D ('the car) to the respondent. The car was registered in the name of one Tay Boon Kok and it bore a registration No MF 9857. The respondent took up the offer after satisfying themselves that all the particulars given in the registration book issued by the first appellant appear to be in order. The respondent were also informed that the RIMV file pertaining to the car had already been transferred to the second appellant. The purchase price of the car was agreed at RM25,000 and after Tay had signed the necessary transfer forms, the respondent took possession of the car, paid Tay RM4,000 by way of deposit with the promise to pay the balance of RM21,000 once the car was registered by the second appellant in the respondent's name. The respondent's clerk took all documents signed by Tay including the registration book to the second appellant with a view of having the car transferred and registered into the respondent's name. The particulars in the documents produced by the respondents were verified with the relevant file traced and produced by the second appellant and after making payment of RM20, the second appellant endorsed the registration book with the respondent's name as the new owner of the car. The respondent subsequently sold the car to one Su Yong Hin for RM29,500 on 23 July 1980. The car was duly registered in Su's name with the ownership claimed by Public Finance Bhd. Sometime in February 1981 the police informed the respondent that the car was a stolen car and demanded its surrender. Police investigations revealed that the registration number of the car MF 9857 is false as the car was originally alloted a registration No NM 6617 by the RIMV Negeri Sembilan. MF 9857 was the registration number of a motor Vespa, alloted by the first appellant to one Teoh Yan Teng. The file pertaining to the motor Vespa together with all relevant documents are no longer available traceable. A file on MF 9857 as the alloted registration number of the car was created in the office of the first appellant to replace the original file of the motor Vespa that had gone missing. The particulars of the two registered owners in the registration book of the car contain false information as to their ownership as there are no such persons known as Rosely bin Mohd Yaacob, the first owner endorsed in the registration book and Tay, the second owner from whom the respondent purchased the car. Their addresses were also fictitious. The respondent commenced proceedings against the appellants for an indemnity as they had refunded the whole of the purchase price of RM29,500 to Su as they were not able to give a good title of the car to him.

The issue was whether the law imposes a duty on a public authority to take care that all information supplied by them to a class of persons who relies on such information is accurate and authentic. The Court of Appeal held that where the duty of care is owed to the public at large although there is a duty to keep a register there is no duty to maintain a true and proper one. However, in that case the Court of Appeal found that the duty sought to be imposed on the first and second appellants is the duty to take care that all information given by them to a paying class of persons who seek that information, is accurate to enable that class of persons to conduct private and commercial transactions in relation to the particular vehicle on which the information is sought. Speaking for the Court of Appeal Siti Norma Yaakob JCA (as she then was) said at p 548:

> The duty that was sought to be imposed on the appellants was the duty to take care that all information given by them to a paying class of persons to conduct private and commercial transactions in relation to the particular vehicle on which the information is sought. In other words, the duty to take care is owned to an aggrieved party and not to the public at large.
>
> We also consider that every particular information recorded in the files of a registered vehicle is a representation that such information is accurate and reliable as the paying public particularly owners of motor vehicles, would-be purchasers of such vehicles and those involved in the motor trade like the respondent, rely on such information to conduct private and commercial transactions. It is this concept of general reliance that imposes a duty on the first and second appellants to take care that all information coming from them are accurate.

[38] In *KS South Motors*, the respondent relied on the information in the conduct of their commercial transaction. The purchase of the car by the respondent and the subsequent sale of the car to Su were transacted in reliance on the information provided by the second appellant. As a result of the inaccuracy of the information the respondent were unable to pass good title of the car to Su thereby necessitating a refund of the whole purchase price. In that circumstances the second appellants were under a duty to take care that all information coming from them are accurate. In the present appeal, however, the plaintiffs relied on the information contained in the JPJ search to institute legal proceedings. The plaintiffs contend that as a result of the third defendant's failure to authenticate the validity of the certificate of insurance they have been denied compensation. In fact the plaintiffs' reliance upon the JPJ search is for the purposes of compliance with s 96(2) of the RTA. The plaintiff's loss and damage arose from the road accident and not as a result of the information provided in the JPJ search. The plaintiffs' complaint of being unable to recover compensation because motorcar JDT 3969 was not insured is not related to the JPJ search. In the circumstances of the case the information provided in the JPJ search would not have mattered one way or another. The plaintiffs' loss occurred even before the JPJ search

A was obtained. There was no reliance whatsoever by the plaintiffs upon the information provided by the third defendant in the JPJ search.

[39] The plaintiff's contention of reliance on the JPJ search is also fallacious on two grounds. Firstly, the owner of motorcar JDT 3969 (first B defendant) is required by law upon demand by the plaintiffs to state whether or not he was insured of that liability by any policy (s 98(1) of the RTA). The first defendant is obliged to give the information; failure to do so is an offence. The plaintiffs had the option of demanding from the first defendant C the necessary information prior to instituting their claim against the first and second defendants. It is also pertinent to note that notwithstanding that a JPJ search may contain the particulars of an insurance policy, the insurance policy in question may at any time be cancelled or avoided by the insurer. In such event it is the owner of the motor vehicle in question who should provide the D information as required by s 98(1) of the RTA. If the plaintiffs wanted to be satisfied as to the insurance status of motorcar JDT 3969 as at the date of the accident, then the plaintiffs ought to have demanded the first defendant to furnish the necessary information. There is no evidence that the plaintiffs availed themselves of that right to do so. Instead the plaintiffs opted to rely E solely on the JPJ search. Secondly, the plaintiffs purported reliance on the JPJ search is misplaced as there is an express provision in Part IV of the RTA providing for the contingency where there is no insurance or where the insurance is ineffective; in such instances the victims are to secure compensation from the Motor Insurers' Bureau. On the facts *KS South* F *Motors*, relates to reliance on information for the conduct of private and commercial transactions peculiar to the facts of that particular case. That case is therefore distinguishable and is of no aid to the plaintiff's contention.

[40] In *Dorset Yacht Club*, ten borstal trainees were working on an island in G a harbour under the supervision and custody of three officers. During the night seven of them escaped. It was claimed that at the time of the escape the officers had retired to bed, leaving the trainees to their own devices. The seven got on board a yacht moored off the island and set it in motion. They collided with another yacht belonging to the respondent. The respondent sued the H Home Office for the amount of the damage. A preliminary issue was ordered to be tried whether on the facts pleaded the Home Office, its servants or agents owed any duty of care to the respondent capable to giving rise to a liability in damages with respect to the detention of persons undergoing sentences of borstal training, or with respect to the manner in which such I persons were treated, employed, disciplined, controlled or supervised whilst undergoing such sentence. The House of Lords held, inter alia, that the fact that the immediate damage to the property of the respondent was caused by the acts of third persons, the trainees, did not prevent the existence of a duty on the part of the officers towards the respondent because the taking of the

yacht and the damage to the other was the very kind of thing which the officers ought to have seen as likely, or the right of the officers to control the trainees constituted a special relation which gave rise to an exception to the general rule that one person is under no duty to control another to prevent his doing damage to a third. Dorset yacht is distinguishable because the duty of care which was owed to the yacht owners was a duty which arose from the facts and which was quite independent of any statutory obligations. There was also a special relationship in that the officers were entitled to exercise control over the borstal boys who to the knowledge of the officers might wish to take their departure and who might well do some damage to property near at hand. It was not so much a duty to prevent the boys from escaping or from doing damage; it was a duty to take such care as in all the circumstances was reasonable in the hope of preventing the occurrence of events likely to cause damage to the respondent. In the present case there is no element of control or knowledge in existence. The third defendant has no control, supervisory or otherwise over the actions of an applicant for a motor vehicle licence. So long as the application complies with the procedural requirements the third defendant shall grant the motor vehicle licence. *Dorset Yacht* is also of no aid to the plaintiff's contention.

[41] In *Perrett v Collins*, Collins constructed an aircraft from an aircraft kit he purchased. Collins substituted the type B gearbox supplied with the kit with a type C gearbox and installed the type C in the aircraft. As the propeller originally supplied with the kit was not compatible with the type C gear box Collins should have changed the propeller but did not do so. Notwithstanding the aforesaid the inspector of the Popular Flying Association of which Collins was a member inspected and approved the aircraft; a certificate of fitness for flight was also issued. Subsequently Collins took the aircraft on a test flight. As the aircraft descended it went out of control and hit the ground with the result that his passenger was injured. The passenger claimed damages for personal injuries. The issue was whether the aircraft crashed were caused by the negligence of Collins, Popular Flying Association and the inspector. The Popular Flying Association and the inspector denied that they owed a duty of care to the passenger. The Court of Appeal held that it was foreseeable that if Popular Flying Association and the inspector granted a certificate of fitness to fly in respect of the aircraft with an inappropriate gearbox, there was likely to be an accident, and they ought reasonably to have had in contemplation a person travelling as a passenger on the test flight in the aircraft as being so affected when they were directing their minds to the acts or omissions which were called to question. The facts of *Perrett v Collins* are distinguishable on account of the different statutory obligations and characteristics. The relevant provisions imposing a statutory duty included: (i) art 7 of the Air Navigation Orders 1980 ('ANO') which provides that 'an aircraft shall not fly unless there is in force in respect thereof a certificate of airworthiness' in respect to the aircraft; and (ii) art 8(1) of the

ANO which provides that the authority shall issue a certificate of airworthiness if it is satisfied that the aircraft is fit for flying having regard to the design, construction, workmanship and materials of the aircraft which it considers necessary for the airworthiness of the aircraft. The statutory duty imposed by art 8(1) of the ANO in regard to the issuance of the certificate of airworthiness before an aircraft may fly is plain and unequivocal. The Court of Appeal held that there was sufficient relationship of proximity where Collins (a passenger in the aircraft) belongs to a class which is or ought to have been within the contemplation of the defendant and the defendant by reason of his involvement in an activity which gives him a measure of control over and responsibility for a situation which, if dangerous, will be liable to injure Collins, the defendant is liable if as a result of his unreasonable lack of care he causes a situation to exist which does in fact cause Collins injury. Therefore the basic elements of assumed responsibility by a person having professional expertise exist on one hand on the part of the defendant which expertise the defendant will be relied upon by Collins gives rise to a special relationship or proximity based on the particular statutory obligations in that case. These elements do not exist in the present case. In the present case the road accident took place even before the JPJ search was obtained. There is no similar provision in the RTA alike art 8(1) of the ANO. Secondly, this case does not concern professional expertise where there is an assumption of responsibility in a highly skilled area. Thirdly, the inspector had supervisory control over the construction of the aircraft for which the aircraft cannot fly unless a certificate of airworthiness is issued. In the circumstances the loss and damage to the plaintiffs could not have been foreseeable. All these characteristics giving rise to a special relationship required by the law of negligence does not exist in the present case. *Perrett v Collins* is therefore of no aid to the plaintiff's contention that there existed a proximity in the relationship between the plaintiffs and the third defendant.

[42] Thirdly, is it just and reasonable to impose a duty of care? The duty to ensure that the certificate of insurance is valid and not a forgery is an onerous responsibility and heavy burden on the third defendant. The detection of forged certificates requires specialised skill and expertise. Certificates of insurance are issued by different insurance companies. On top of it the third defendant receives a very substantial number of applications for motor vehicle licences daily. The counter clerks at the third defendant offices throughout the country would have to be either all trained in the science of detection of forgeries or otherwise replaced by a team of qualified experts. Clearly this additional responsibility is impractical and unreasonable. It would also be unjust as the duty to ensure the authenticity of certificates would entail delay thereby causing hardship to the public as a whole. Additionally, the intention of the Legislature in providing for the Motor Insurers' Bureau to cater for the contingency where road accident victims are denied compensation by the absence of insurance or effective insurance

precludes any attempt to impose a common law duty of care on the third defendant. It has always been the position that once a statute governs or regulates a specific area then the common law is excluded (s 3(1) of the Civil Law Act; *Steven Phoa*).

[43] In *Ketua Polis Negeri Sembilan & Anor v Manoharan Dorasamy*, the respondent bought a car brought in from Sabah. Before purchasing the car the respondent had checked the engine and chassis number which was found to be in order. The Road Transport Department (second appellant) had also inspected the engine and chassis number of the car and re-registered the car to its present No NAJ 1912 and endorsed the respondent as its registered owner. Subsequently the Road Transport Department blacklisted the car upon discovering that its documents might have been forged by a syndicate in Sabah. Following that the car was detained by the police (first appellant) on suspicion that is was a stolen property. The car was released on bond to the respondent pursuant to s 413 of the Criminal Procedure Code. Apparently, the release was triggered by a chemist report that although the car's engine number had been tampered with, there was no way of knowing the original number or the car's original owner. The respondent alleged that the detention of the car by the first appellant was illegal, and in the circumstances claimed for declaration that he was the beneficial owner of the car and for damages. The respondent's claim was dismissed by the High Court. On appeal the Court of Appeal allowed the claim and ordered for damages to be assessed. On appeal to the Federal Court the appellants posed the following questions of law, namely:

(i) whether a motor vehicle which is suspected to be stolen, whose engine and chassis number have been tampered with and whose ownership and other details are being investigated by the police can be summarily returned to the respondent without an enquiry being conducted under s 413 of the Criminal Procedure Code;

(ii) whether s 24(4) of the Police Act 1967 applies to a stolen motor vehicle but which is not a vehicle used in the commission of an offence; and

(iii) whether ss 8, 10, 11 and 12 of the RTA impose a duty on the second appellant as the Registrar of Motor Vehicles to inspect every vehicle submitted for registration or transfer of registration.

[44] The Federal Court answered the first question in the negative and the second question in the positive. As to the third question the Federal Court answered in the positive. Abdul Malek Ahmad FCJ (as he then was) said that the third question appears to be blatantly stating what is already clear and unambiguous when one reads the provisions of ss 8, 10, 11 and 12 of the RTA. Abdul Hamid Mohamad JCA (as he then was) took the same view but added that it is unreasonable and not practical to require every inspection of

the engine and chassis numbers of every vehicle to be done by the chemist for the purpose of registration. Normal physical examination by officers of the second appellant would suffice. Similarly, in the present case, it would be unreasonable and impractical to require every certificate of insurance to be authenticated for the purposes of granting a motor vehicle licence. Normal physical examination of the certificate of insurance by the counter clerk of the third defendant offices would suffice. For the aforesaid reasons it would be unjust and unreasonable to impose a duty of care.

[45] The plaintiffs also contended that the third defendant were under a duty to take preventive measures by being more alert in detecting the forged certificate of insurance. If the third defendant had been more alert motorcar JDT 3969 would not have been issued with a motor vehicle licence. In granting a motor vehicle licence for motorcar JDT 3069 the third defendant allowed the motorcar to be used on the roads to the detriment of the plaintiffs. The third defendant had failed to protect the plaintiffs from being injured or knocked by motorcar JDT 3969 (art 5 of the Federal Constitution; *Van Colle & Anor v Chief Constable of Hertfordshire Police* [2007] 3 All ER 122).

[46] In *Van Colle*, *G* was required to give evidence for the prosecution at the trial of a former employee *B* for theft. There was a series of threats and incidents of interference with witnesses and witness intimidation by *B* involving *G* and other prosecution witnesses. The police were informed of that intimidation and should have been aware of it; however, no action was taken to protect *G*. *B* murdered *G* shortly before the trial for theft took place. The individual police officer involved faced disciplinary proceedings, during which he conceded that he should have appreciated that there was a risk to *G*'s life, and that he had not considered at any stage the need for protection. *G*'s parents brought proceedings pursuant to the Human Rights Act 1998 claiming that the defendant who was vicariously liable for the acts or omissions of his officers, had failed in his duty to act compatibly with *G*'s right to life under art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. The trial judge held that a fact-sensitive approach should guide the domestic courts in exercising the discretion given to them under the 1998 Act as to the appropriate remedy for a claimant who had established a violation by the state of its obligation to take protective measures to protect his life from the criminal acts of a third party, and that, in order for the court to be satisfied that an award of damages was necessary to afford just satisfaction to a victim of the state's breach of art 2, the victim did not have to prove causation of damage on the 'but for' test. The trial judge held that, on the facts, the proper question was whether the protective measures that were reasonably open to the police officer in the circumstances could have had a real prospect of altering the outcome and

avoiding *G*'s death. She found that there had been violations of arts 2 and 8, and awarded damages of £50,000. The defendant appealed. The Court of Appeal held that (i) the judge had rightly concluded that the police should have taken action to protect *G*. They should have known that there was a real risk to his life and that the risk would remain immediate until the date of *B*'s trial. In those circumstances they should have done all that could reasonably have been expected of them to minimise or avoid the risk; (ii) the judge had been entitled to hold that *G* had lost his life as a result of the infringement by the police of his right to life under art 2. The trial judge rightly concluded that the protective measures reasonably open to the police in the circumstances would have had a real prospect of altering the outcome and avoiding *G*'s death and that if the correct action had been taken *G*'s death would have been avoided.

[47] The plaintiffs' reliance upon *Van Colle*, in support of their contention that the third defendant's failed to protect the plaintiffs because of its failure to take the aforesaid preventive measures is misconceived. *G* was a witness for the prosecution. The police should have known that there was a real risk to his life but failed to take any steps to minimise or avoid the risk. The trial judge found that the protective measures that were reasonably open to the police could have had a real prospect of altering the outcome and avoiding *G*'s death. The facts in *Van Colle* are peculiar to that case and are clearly distinguishable.

[48] To conclude, there is no statutory duty on the part of the third defendant to ensure that the certificate of insurance lodged on an application is valid and not a forgery. The court also found that the third defendant did not owe a common law duty of care in this regard. In the particular circumstances of this case the loss and damage to the plaintiffs was not foreseeable as: (i) the accident occurred on a date prior to the JPJ search; and (ii) the information provided in the JPJ search could not possibly have caused or led to the plaintiffs' injury or damage. Secondly, the basic elements of assumed responsibility on the part of the third defendant and reliance on the part of the plaintiffs did not exist to create a sufficiently proximate relationship between the plaintiffs and the third defendant. Thirdly, the imposition of this additional responsibility would be impractical as it would not only require all counter clerks to be trained in the science of detection of forged certificates of insurance but also incur undue delay in the processing of applications. It is therefore not just or reasonable to impose a duty of care on the third defendant. Applying the three tests laid down in *Caparo* to the particular circumstances of this case there is clearly no common law duty of

A care owed by the third defendant to road users to ensure that the certificate of insurance is valid and not a forgery. The plaintiffs' appeal is therefore dismissed with costs.

Appeal dismissed with costs.

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Reported by Andrew Christopher Simon

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